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No. 232

IN THE

Supreme Court of the United States

October Term, 1952.

THE UNITED STATES, *Petitioner,*

v.

GEORGE J. SCHAEFFER and HERMAN ROBBINS, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Claims.

BRIEF IN OPPOSITION.

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OPINION BELOW.

The opinion of the Court of Claims overruling petitioner's demurrer (R. 4-6) is reported at 114 C. Cls. 568. The opinion of the Court of Claims supporting the final judgment (R. 15-17) has not yet been reported.

JURISDICTION.

The judgment of the Court of Claims was entered on March 4, 1952 (R. 17). On May 28, 1952, the Chief Justice extended the time within which the petition for a writ of certiorari might be filed to and including August 1, 1952. (R. 18). The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. 1255.

QUESTION PRESENTED.

Whether the plaintiffs whose vessel was requisitioned under Section 902 of the Merchant Marine Act of 1936, as amended, and who, in accordance with the procedure specified therein awaited an administrative determination of just compensation, and after rejecting said determination accepted a payment of 75 percent of the amount so determined and within six years of the date of said determination filed suit in the Court of Claims for the balance owing on account of just compensation are barred by the Statute of Limitations.

STATUTE INVOLVED.

46 U. S. C. § 1242(d) reads as follows:

> "In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by sections 41 (20) and 250 of Title 28."

STATEMENT OF THE CASE.

The relevant factual data is given in the Petition (p. 5).

The statements in the Petition describing the decision of the Court of Claims below, 114 Ct. Cls. 568 (1949), are not correct. The petitioner asserts (p. 6) that the Court of Claims ". . . construed Section 902(d) as providing for an administrative remedy which *had to be exhausted* before the owner of the requisitioned vessel had access to the courts." (Italics supplied) The petitioner also states that the Court of Claims ". . . held that *respondents' claim for just compensation did not accrue at the time of the taking. . .*" (Italics supplied)

The Petitioner has misconstrued the decision of the Court of Claims and by so doing has created illusory issues.

The Court of Claims, in referring to portions of 46 USC 1242, held:

> "Congress by the terms of the act just quoted provided for the requisitioning of needed vessels. It provided a method of payment for such vessels. It is desirable that such procedure be followed. Certainly plaintiff should not be penalized for following it." (citing cases) (114 Ct. Cls. 568)

The Court of Claims, in referring to the part of the Statute (Section 1242(d) which provides:

> ". . . such person shall be paid 75 per centum of the amount so determined and *shall be entitled to sue the United States. . . .*"

made the following determination:

> "The quoted clause specifically confers the right to sue, and certainly that right does not accrue until the terms of the Statute are complied with."

The Court added that

> "This is an affirmative right conferred by the terms of the Statute itself".

and further, that this right existed

> ". . . regardless of whether the plaintiffs could or could not have, by ignoring the Statute, pursued another remedy." (114 Ct. Cls. at 571)

The issues raised by the Petitioner are not present in this case. The Petitioner, in effect, is attempting, through the medium of this proceeding, to get a declaratory judgment on all manner of Statute of Limitation problems involved in the requisitioning by the government of private property without regard to the wording of the specific statute involved.

SUMMARY OF ARGUMENT.

This case does not involve any substantial question of federal law calling for a decision by the Supreme Court.

The case is unique and raises no question of general importance. Contrary to the statement in the Petition there are no known pending cases which have the same issues as are involved in this case.

The decision of the court below is consistent with prior decisions of the Supreme Court.

There are no conflicting decisions of Courts of Appeals to be resolved.

The decision of the court below is consistent with its own prior decisions.

ARGUMENT.

I. The Case Does Not Raise Any Important Federal Question.

The sole issue in this case is whether a statute which provides that an owner "shall be entitled to sue the United States" means what it says.

The statutory language is clear. There is no ambiguity. The Congress provided an administrative procedure for settling just compensation claims arising from the requisitioning of vessels. As an inducement to owners to follow this procedure, it was provided that should the administrative determination be unsatisfactory, the owner shall be paid 75 per cent of the amount so determined and thereafter be entitled to sue for the balance owing. The statute provides:

> ". . . such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as added to said 75 per centum, will make up such amount as represents just compensation therefor . . . ." (Section 1242d, 46 U. S. C.)

The Court of Claims was unanimous in holding that the statute in fact conferred upon the owner of a vessel a right to sue for such further sum, which added to the 75% received would constitute just compensation and that therefore a suit filed within six years of the accrual of that right was timely.

The petitioner's contention is that the statute confers no right to sue. This would mean that any one who followed the prescribed administrative procedure would be penalized for doing so by having a shorter time within which to file suit. Under petitioner's theory, if the Government should delay a determination for six years, an owner who followed the statutory procedure would, upon receiving 75 per cent of the determined amount, not be able to sue for the balance at all.

Apparently recognizing that the issues upon which this case turns is not one requiring review by the Supreme Court, petitioner endeavors to raise other points for Supreme Court consideration. Referring to the instant case, petitioner states:

> "By direct implication it raises the problem whether the owner has access to the courts immediately after the taking . . . ." (page 7).

This issue is not explicitly or implicitly in the case. The respondents did not bring suit for just compensation immediately after the requisitioning of their vessel but followed the remedial statutory procedure specifically made available for such claims as theirs.

The rights of an owner of a vessel who does not avail himself of this statutory remedy is not in issue in this case.

II. The Case Is Unique and Not of General Importance.

The present case involves the principal sum of $6,250. The petitioner has endeavored to create the impression, however, that the case turns on issues of great importance and general applicability. Petitioner stated to the Court:

"At least twelve cases presenting the same issues and involving more than $40,000,000 are now pending in the Court of Claims." (Page 7).

There is nothing in the record to substantiate this statement. But even apart from that fact and looking outside the record, the statement is simply not true. Counsel for the petitioner has identified for counsel for the respondents the twelve cases referred to in the petition. Far from substantiating petitioner's statement of the general applicability of the present case, reference to these twelve cases establishes that the contrary is in fact true. Not one of these twelve cases turns on the issues involved in the instant case.

By far the bulk of the $40,000,000 figure referred to is involved in seven cases which arise out of the requisitioning of 35 Danish ships. In each of those cases, contracts of accord and satisfaction were entered into with the United States Government within six years of the date of requisition. More than six years after that date the United States Government refused to carry out those contracts. A decision by the Supreme Court in the instant case could in no way resolve any statute of limitations problem there may be in the Danish ship cases.

The other five cases referred to in the petition are distinguished in the footnote.[1]

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[1] The case of Franco Italian Packing Co. v. U. S., Ct. Cl. #50268 involves the commandeering of vessels by the U.S. Navy. The subject statute is not involved. There was no part payment. Plaintiff is proceeding by virtue of the enactment of a private bill. The Statute of Limitations is not in issue.

The cases of Stafford Ordnance Corp. v. U. S., Ct. Cl. #49992 and Ettlinger v. U. S., Ct. Cl. #49269 involve requisitioning of ordnance material by the War Production Board. The subject statute is not involved. There were no part payments. The defendant made a motion for summary judgment in the Ettlinger case based upon the Statute of Limitations. In its brief the defendant stated, " . . . even if we accept the principles stated in this decision (Schaeffer and Robbins v. U. S., 114 Ct. Cl. 568) we find that it is clearly inapplicable to the present case." Thus, the de-

Under the particluar circumstances of the instant case suit was filed within six years of an administrative determination and also within six years of the date on which the Respondent received part payment from the United States Government. In the opinion of the Court below the fact of part payment was regarded as an alternative basis for the holding. Supreme Court consideration of this case would therefore not necessarily result in a decision even on the narrow question of whether or not an owner has six years within which to file suit following an administrative determination of just compensation as provided for by Statute.

III. The Decision of the Court of Claims Is Consistent With Its Prior Decisions and With the Prior Decisions of This Court.

Despite the fact that both the Statute involved and the decisions of the Court of Claims are simple, clear and unambiguous, the Petitioner has sought to create non-existent issues, by drawing unwarranted inferences. Then assuming these inferences to be facts, the Petitioner contends that the decision of the Court of Claims is in conflict with its prior decisions and with the decisions of the Supreme

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fendant is in the incongruous position of contending in this Court that the Ettlinger case and this subject case have the same issues—while taking a directly opposite position in the Court of Claims.

Richfield Oil Corporation v. U. S., Ct. Cl. #50436, involves a suit under the Fifth Amendment of the Constitution and not under the subject Statute. Plaintiff alleges it entered into charter party agreements with the Maritime Commission as a result of "economic duress and coercion". Plaintiff seeks to recover the difference between what it received and just compensation guaranteed to it under the Fifth Amendment.

Anderson v. U. S., Ct. Cl. #48603 is a suit for just compensation. Claim was filed with the War Shipping Administration which made offers to the plaintiff. The plaintiff rejected the offers, but did not request or receive the 75% part payment permitted by the Statute. There is a question in this case as to whether the plaintiff had abandoned its statutory rights.

Court. In support of its position the Petitioner cites several cases. Not one of these cited cases has any bearing on the precise and narrow issue which is involved in this case.

For example, the decision in the case of *United States* v. *McNeil and Sons* (267 US 302) was cited by the Petitioner as being in conflict with this case. The McNeil case involved a claim for just compensation resulting from the requisitioning of coal by the government. Suit was instituted in the U. S. District Court on the basis of the Fifth Amendment and Section 10 of the Lever Act. A demurrer was filed by the government based on the ground that the claimant had not followed the Statutory procedure set forth in the Lever Act. The Court held:

> "Jurisdiction was invoked under the Lever Act. The claim is for something alleged to have been commandeered or requisitioned by the President as provided by Section 10 and this section confers jurisdiction without qualification upon district courts to hear and determine controversies directly resulting from such action".

The instant case is clearly distinguishable from the McNeil case because in the McNeil case the claimant did not follow the statutory procedures.

While the Petitioner concedes that the case of *McMahon* v. *United States* (342 US 25) is distinguishable (p. 14) from the case at issue, it contends that that case supports its position ". . . that the Court below has erred."

The McMahon case involved the Suits in Admiralty Act. That Statute provided that any suit thereunder "shall be brought within two years after the cause of action arises." The pertinent administrative regulations then in effect provided that if a claim was not allowed within 60 days after filing "it shall be presumed to be administratively disallowed and the claimant shall be entitled to enforce his claim." The claimant failed to file suit within the time prescribed by the Statute. In the McMahon case the Court said, at page 27

> "We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States."

Apart from the conceded distinguishable features of that case, the decision has no bearing whatsoever on the narrow issue in this case. In the instant case the situation is altogether different. The government, having requisitioned the vessel, could at any time have made a final unilateral administrative determination of the value of the vessel as of the date of requisitioning and thus set the Statute of Limitations running. Claims which are covered by the Suits in Admiralty Act could include some for which the government had no notice whatsoever. The decision in the McMahon case rested solely on the construction of the Suits in Admiralty Act which is not comparable to the Merchant Marine Act of 1936 either in its purpose or language.

The Court below suggested that the payment of 75% of the amount offered by the government and the accompanying acknowledgment that at least the balance of the amount offered was still due might well be construed to toll the Statute of Limitations up to that time. The Court cited the case of *United States* v. *Wilder* (80 US 254) as authority for its position. The Petitioner herein cites the same case as authority for a diametrically opposite position without commenting on this incongruity.

A reading of the Wilder case clearly establishes the position taken by the Court below. The principle as enunciated by the U. S. Supreme Court in 1871 is set forth at page 256 as follows:

> "The principle on which part payment takes the case out of the Statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due."

CONCLUSION.

The instant case raises no substantial federal question, does not involve an issue of broad applicability and is in harmony with other decisions of this Court and of the Court of Claims. The petition for certiorari should therefore be denied.

Respectfully submitted,

SOLOMON DIMOND
Attorney for Respondents

October 9, 1952.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 232

THE UNITED STATES, PETITIONER

v.

GEORGE J. SCHAEFFER AND HERMAN ROBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In their brief opposing certiorari (pp. 6-7), respondents dispute our assertion (Pet. 7) that at least twelve cases involving over $40,000,000 present the issues arising in the instant case. Pointing out that government counsel has supplied them with the list of twelve cases on which our statement was based, respondents declare flatly (Br. in Opp. 6) that "Not one of these twelve cases turns on the issues involved in the instant case." As to all except one of the cases in question, respondents are mistaken. Eleven of the cases, presenting claims

totalling over $40,000,000, support our statement. As to the twelfth, involving a relatively trivial sum, our statement was incorrect. While this error is profoundly to be regretted, we believe that it does not affect the importance of this case or the need for review by this Court.

1. As respondents point out (Br. in Opp. 6), most of the $40,000,000 mentioned in our petition is claimed in seven cases arising out of the requisitioning of 35 Danish ships in 1941.[1] Contrary to respondents' assertion (*ibid.*), each of these cases involves a claim for just compensation, each was brought more than six years after the requisitioning date,[2] and each would be controlled by a decision of the limitations problem posed in the instant case.[3] It is true that the plaintiffs in those cases, *as alternative claims,* plead contracts with the Government for payment for the ships and seek recovery on the contracts. (These contract claims are for a total of about $3,200,000, whereas the just compensation sought totals over $39,000,000 and, if the interest claim is added, exceeds $40,000,000). It is clear, however, that in the claim for just compensation these cases squarely present the

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[1] C. Cls. Nos. 50446, 50447, 50448, 50463, 50464, 50465, and 50466.

[2] The suits were instituted in December of 1951.

[3] The requisitions in these cases were made under the Act of June 6, 1941, 55 Stat. 242, 50 U.S.C. App. 1271-1275, Section 1 of which (50 U.S.C. App. 1271) provides that just compensation shall be paid in accordance with Section 902 of the Merchant Marine Act of 1936, the statute involved in the instant case.

question the Government seeks to have reviewed here.

Ettlinger v. *United States,* C. Cls. No. 49269, is an eighth case which would be disposed of if the Government's views in the instant case were to prevail. The requisition in that case was made under the Act of October 16, 1941 (55 Stat. 742, 50 U.S.C. App. (1940 ed., Supp. IV) 721) which, like the statute here, provides for an administrative settlement and partial payment in the event of disagreement. There, as here, the suit was filed more than six years after the taking and there is a question whether the intervening efforts to reach a mutually satisfactory administrative determination tolled the statute of limitations.

Vividly demonstrating that the issues on which we seek review directly affect *Ettlinger* is the fact that counsel in that case was permitted by the Court of Claims to file a brief as *amicus curiae* in the instant case. The Government believes, as respondents point out (Br. in Opp. 6, n. 1), that the plaintiff in *Ettlinger* may fail even if the decision below in the instant case is followed there. This does not alter the fact that our position here, if sustained will control in that case.

A ninth case, *Stafford Ordnance Corp.* v. *United States,* C. Cls. No. 49992, is the same, for present purposes, as *Ettlinger* and is likewise directly affected by the decision in the instant case.

Anderson v. *United States,* C. Cls. No. 48603, arising under the statute involved in the instant case, repeats the pattern of (1) requisition, (2) a

suit more than six years later, and (3) administrative action during the interim period to determine just compensation. Respondents again mistakenly reason that a possible additional basis for decision eliminates in advance the plainly presented issue which is of concern here (Br. in Opp. 6, n. 1).

A similar mistake explains respondents' denial that the issue here arises in *Richfield Oil Corp.* v. *United States,* C. Cls. No. 50436. There, too, the plaintiff sues for just compensation more than six years after the taking. At the same time, that plaintiff, in another suit, in a federal district court, is seeking to have set aside a contract with the Government fixing its compensation. . It seems clear that, unless the statute is tolled pending the claimant's effective rejection of the compensation administratively determined to be proper, the Court of Claims suit must fail for substantially the reason urged by the Government in this case.

2. It must be conceded, however, that respondents are correct in stating that the twelfth case to which our petition had reference, *Franco-Italian Packing Co.* v. *United States,* C. Cls. No. 50268, where the claimant seeks $67,025.20, does not present the issue involved here. There, though the suit was brought more than six years after the taking, the private law authorizing the action (Priv. Law No. 808, 81st Cong., 2d Sess.) expressly waived the statute of limitations. We very much regret the error. The fact remains that the eleven remaining cases in the list given to respondents involve well over the $40,000,000 figure named in

our petition; this, plus the continuing importance for the future of the issue presented, is in our view sufficient to justify review by this Court.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1952.

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